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Benjamin R. Civiletti

Giving Unofficial Life to a Secrets Act

On Feb. 19, 1980, the Supreme Court found that Frank Snepp (a former Central Intelligence Agency officer in Vietnam) had deliberately violated an express term of his employment agreement with the CIA by causing the publication of his book "Decent Interval" without first submitting the manuscript to the CIA for pre-publication review as his contract required. In light of this breach of his express fiduciary duty, the court approved a constructive trust, transferring all of Snepp's income from his book to the government. A final judgment of approximately \$150,000 was later entered against him.

The facts before the Supreme Court and, therefore, its decision, were both narrow, concerning a former CIA employee whose written contract contained an express pre-publication review clause.

However, in two footnotes, the court's opinion went much further, commenting that even in the absence of a written contract, government employment itself could give rise to a fiduciary obligation not to disclose confidential information obtained during the course of employment whether classified or not. This dictum immediately raised concerns about the decision's adverse impact on prior-restraint doctrine, whistle-blowing and First Amendment rights. Many feared the chilling effect of uncertain liability of all government employees, newspapers and publishers for uncleared disclosures and publications.

These uncertainties raised the specter that the government would use the *Snepp*-type case to impose a broad censorship threat and an expansive view of secrecy requirements to create an official secrets act.

In May 1980, the Department of Justice began work on guidelines to more precisely direct its lawyers' use of the *Snepp* procedures, to

impose certain limitations in this area and to create greater certainty by advising affected agencies and departments and the public of the grounds for future actions. Overall, the guidelines were issued to dispel any apprehension that the *Snepp* decision would be used as a judicially-created secrecy act to support massive censorship. They were also intended to help preserve the efficacy of necessary pre-publication agreements in sensitive positions and the deterrent value of the *Snepp*-type suit. After lengthy consultations with the other government agencies, final guidelines were promulgated on Dec. 9, 1980.

The guidelines confined suits against employees to cases where regulations or contracts expressly required pre-publication review. They required that the pre-publication review process itself satisfy constitutional standards for procedural protection to employees. They spelled out the vital distinctions between criteria for suits against covered employees for damages and the higher standards required by prior-restraint law applicable to third parties and pre-publication injunctions. And the guidelines restricted any jeopardy to newspapers and publishers to situations where the third party knew of the pre-clearance requirement and actively solicited disclosure in violation of it.

Attorney General William French Smith has just revoked the *Snepp* guidelines "to avoid any confusion over whether the United States will evenhandedly and strenuously pursue any violation of confidentiality obligations." It is difficult to understand the claimed "confusion" and, as a result, it is a fair inference that the revocation resulted from the department's desire to pursue *Snepp* suits against any present or past employee and any newspaper or publication free of the safeguards, limitations and predictability of the guidelines. If that is the true intent of the revocation, all of the original concerns about the *Snepp* case are resurrected and the fear of its breadth and use are given real life.

It is too early to tell whether revocation of these guidelines is an attempt to chill disclosures that are critical of the government and to aggressively seek constructive trusts to deter publications is merely a token bow to persistent demands of some members of the intelligence community or yet, is simply discarding a prior administration's method of dealing with a complicated set of problems. The revocation is puzzling because with or without the guidelines the Department of Justice will still be required to carefully assess the strength of its cases and to closely observe constitutional rights and restraints before litigating in this sensitive field. Without this selective approach, bad cases will

be brought which result in the axiomatic bad law. In this regard, it is encouraging that simultaneously with revocation of the guidelines, Attorney General Smith said that he retained the *Snepp* suit authorization power in the hands of the attorney general "to ensure that enforcement policies will be consistently applied and fully compatible with First Amendment rights." He has made no more important commitment.

The government cannot tolerate employees who breach their duties and endanger our intelligence capacity and the national security, but there are numerous ways to punish and deter such acts in appropriate cases, from discipline to discharge to criminal prosecution. Unless carefully controlled, the power given the government in the *Snepp* case can undermine other important rights. Moreover, those in government service and the American public deserve certainty, predictability and consistency. The guidelines were designed to provide accountability for the government's use of an important enforcement procedure. With their revocation, that accountability has been diminished and we are left to hope that the *Snepp* power is used sparingly for those few serious cases that deserve its crushing force and is not used to chill dissent and to war against fragile First Amendment rights.

The writer was attorney general in the Carter administration.